United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

828

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23, 869

UNITED STATES OF AMERICA

v.

BENJAMIN I. NICHOLS

Appellant

Appeal from the United States District Court
for the District of Columbia

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MISCELLANEOUS:

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ISSUES PRESENTED FOR REVIEW *

I. Was the acceptance of appellent's guilty plea a violation of his Fifth Amendment right against double jeopardy?

II. Did the court err in sentencing appellant to a term of years to be served consecutively to a term then being served for the same offense?

III. Did the court comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure in accepting appellant's guilty plea?

REFERENCE TO RULINGS

The court below sentenced appellant to a period of 3 to 9 years, said sentence to run consecutively to any sentence then being served. (Sentencing transcript, P. 4)

STATEMENT OF THE CASE

The appellant, Benjamin I. Nichols, petitions this Court to review and set aside his conviction and sentence on a plea of guilty in the United States District Court for the District of Columbia on one count of assault with a dangerous weapon, 22 D. C. Code 502.

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*This case was not previously before this Court.

STATEMENT OF FACTS

On October 24, 1969, appellant pleaded guilty on one count of assault with a dangerous weapon. (P. T. 3)[1] He pleaded not guilty on the remaining 14 counts of the indictment against him. Appellant Nichols and two others had been charged in connection with a robbery of the National Capitol Bank of Washington on October 22, 1968. (see Indictment in Criminal Case File) At the time of the plea the judge determined that appellant was represented by an attorney who had consulted with him. (P.T. 3) The judge advised appellant of his right to a jury trial and to be confronted by any witnesses against him. (P. T. 4) The judge asked if appellant was making his plea because he was guilty and not because any threats or promises had been made to him. (P.T. 4-5) He discerned that appellant knew that the maximum sentence for the charge was ten years. (P.T. 5) The court accepted the guilty plea (P.T. 6) and on December third, 1969, sentenced appellant to 3 to 9 years, the sentence to run consecutively to any other sentence then being served. (S.T. 4)[2]

At the time of his plea and sentencing appellant was in fact serving a sentence elsewhere. He and the men indicted

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1"P.T." refers to pages of the transcript of the plea.

2"S.T." refers to pages of the transcript of the sentencing.

with him had been tried and convicted and sentenced in the State of Maryland in January of 1969 on charges of larceny arising out of that same robbery of the National Capitol Bank on October 22, 1968.[3] This fact was brought out at the time of sentencing, but not at the time of the plea. (S.T. 2)

STATUTE INVOLVED

Federal Rules of Criminal Procedure

Rule 11. Pleas....The court may refuse to accept a plea of guilty and shall not accept such plea or a plea of nolo contendere without first addressing the defendent personally and determining that the plea is made voluntarily with the understanding of the nature of the charge and the consequences of the plea....

ARGUMENT

I. THE ACCEPTANCE OF APPELLANT'S PLEA OF GUILTY VIOLATED HIS FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY

The Fifth Amendment of the United States Constitution provides "nor shall any person be subject for the same offense or be twice put in jeopardy of life and limb." In the instant case appellant was twice indicted and twice convicted of the same offense, robbing the National Capitol Bank of Washington on October 22, 1968. Such double indictment and double conviction was in direct violation of the

[3] See indictment of the State of Maryland and docket entries in Criminal Case 8481 of the Circuit Court for Prince George's County, State of Maryland, both documents having been lodged with this Court.

words and spirit of this Amendment, words which detail one of our most vital rights. The Supreme Court has twice in the past year given new life and emphasis to these words. Ashe v. Swenson, 397 U.S. 436 (1970); Waller v. Fla., 397 U.S. 387 (1970). In Ashe, in applying the rules of collateral estoppel to criminal cases, the Court noted the need for realism and rationality in this area. Ashe, supra at 444. In Waller the Court held that the double jeopardy clause prohibits double trial and conviction on the same offense by a state and a city within that state.

In this modern age of easy movement from one jurisdiction to another, when our once immense land has become immeasurably smaller, it is no more rational or realistic to allow trial and conviction for the same offense in two separate states, nor a state and the District of Columbia, than it is to allow trial and conviction in a state and a city.

This is particularly evident in areas like that of Metropolitan Washington, D. C., an area which is for so many purposes a functional whole, and yet encompasses the District of Columbia and parts of two separate states. The conviction of appellant by the District of Columbia after his conviction in Maryland for the same offense violated his Fifth Amendment right against double jeopardy.

III. THE COURT BELOW ERRED IN SENTENCING APPELLANT TO A TERM OF YEARS TO BE SERVED CONSECUTIVELY TO A TERM ALREADY BEING SERVED FOR THE SAME OFFENSE

Appellant was convicted in January of 1969 in Maryland on charges of larceny arising from a robbery of the National Capitol Bank of Washington. He was sentenced to a term of ten years. In October of 1969, he pleaded guilty in the District of Columbia to one count of a fifteen count indictment arising out of the same bank robbery. The judge, aware of the sentence being served in Maryland, nonetheless sentenced him to a term of three to nine years, such term to run consecutively to the Maryland sentence. Such double punishment constitutes a violation appellant's rights and should not be allowed to stand.

This Court has examined the question of double punishment in the past. In Ingram v. U.S., 122 U.S. App.D.C. 334 (1965) and Davenport v. U.S., 122 U.S. App. D.C. 344 (1965), this Court struck down the use of consecutive punishments. Using the rule of lenity, the Court held in each case that, in light of the uncertainty as to whether Congress intended there to be consecutive sentences where the offenses charged arose in the same transaction, they would take the less harsh reading and decide against consecutive sentences. In Ingram this Court noted that the Supreme Court has favored consecutive sentences only in the case of narcotics. Ingram, supra at 336. In Irby v. U.S., 129 U.S. App. D.C. 17, 390 F.2d 432 (1967), this Court considered the problem of consecutive

sentences en banc. The Court appointed an amicus curiae to examine thoroughly the problems involved in consecutive sentencing and the use of the rule of lenity. Amicus presented a review of the law in this and other jurisdictions and recommended that the rule of lenity be replaced by a supervisory rule that consecutive sentences not be given for offenses arising out of a single course of conduct unless (1) the judge found that the defendant was not motivated by a single intent and objective, and (2) the judge recited the reasons why he felt a consecutive sentence necessary to achieve one of the recognized sentencing goals. (See Brief of Amicu Curiae, Irby v. U.S., No. 19, 9[illegible].) This Court did not pass on the merits of amicus' proposition for it found Irby an unsuitable case for such decision. Irby wqs an old case; the judge was dead and the record most uninformative as to the facts of the case. This Court suggested that in the future, a judge contemplating consecutive sentences should get the facts of the case on the record. Although the judge did not do so here, this case is a recent one and an excellent one for adoption of the suggested Irby rule. Here the offense cahrged in Maryland and the District of Columbia arose out of a single course of conduct, the robbery of the National Capitol Bank of Washington and the carrying away of the stolen money. The robbers had a single objective, to take the money and keep it. Appellant did not have a bad criminal record. (S.T. 3.) The maximum

of the combined Maryland and District sentences given was nineteen years, a period of time longer than appellant could have received for either of the offenses charged.[4] The judge gave no reason for his use of a consecutive sentence although counsel for appellant had urged that appellant be given a sentence concurrent with that in Maryland. (S.T. 2-3.) Under the suggested rule of Irby appellant should not have been given consecutive sentences. It is urged that this rule be adopted and that appellant not be punished twice for the same offense.

III. THE COURT BELOW DID NOT COMPLY WITH THE PROVISIONS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ACCEPTING APPELLANT'S PLEA OF GUILTY

Rule 11 of the Federal Rules of Criminal Procedure provides that the court shall not accept a guilty plea "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Under the holding in McCarthy v. U.S., 394 U.S. 459 (1969), the trial judge must comply precisely with the requirements of this rule. The judge must personally inquire of the defendant as to his understanding both of the charge and of the consequences of

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4. Violation of 22 D.C. Code 502 carries a maximum sentence of ten years. Violation of Art. 27, Sect. 340 of Maryland Code carries a maximum sentence of fifteen years in a penitentiary or ten years in a house of correction or jail.

of his plea. Inquiry by any third party will not suffice. The pleas constitutes an admission of each of the elements of the crime. In order for it to be a knowing and voluntary admission the defendant must possess an understanding of the law in relation to the facts of his own case. McCarthy, supra.

In the instant case appellant pleaded guilty to a charge of assault with a dangerous weapon. At no time on the record did the judge examine the appellant as ti his understanding of the elements of the offense of assault with a dangerous weapon. It was not proper to assume that appellant knew what all these elements were or that he knew that each of the elements must be present beofre there could be considered to be an assault with a dangerous weapon. The judge did not ascertain what conduct appellant admitted. Thus he could not know if the facts admitted constituted the crime to which appellant pleaded guilty.

McCarthy further requires that the judge satisfy himself that a factual basis exists for the defendant's plea. In this case the judge brought out none of the facts. He accepted a plea of guily of assault with a dangerous weapon without first finding out what weapon, if any, was use; he in no way explored the circumstances under which the assault allegedly occurred. Without such questioning he could not be certain that there was a

factual basis for the plea.

It was not demonstrated that appellant fully understood the consequences of his plea. While he knew that the maximum sentence could be ten years, it is doubtful that he realized that this sentence could be made to run consecutively to one already being served for the same bank robbery. The judge made no attempt to explain to him that his sentence could, in effect, be doubled. The American Bar Association, in its suggested standards for pleas of guilty, has asserted that the possibility of consecutive sentences is a consequence of which defendants should be apprised. (See suggested standard 1.4(c)iii.) By not determining whether appellant fully understood the consequences of his plea, the judge again failed to comply with the provisions of Rule 11.

In Halliday v. U.S., 394 U.S. 831 (1969), the holding in McCarthy was applied to all cases after April 2, 1969. In this case in which the guilty plea was accepted October 24, 1969, the judge did not meet the requirements of Rule 11. As the Supreme Court noted in McCarthy, "it is not too much to require that before sentencing a man to years of imprisonment, the District Court should take the few minutes necessary ... to determine whether (defendants) understand the action they are taking." Under the rule of McCarthy, this appellant must be afforded the opportunity to plead anew.

CONCLUSION

For the above reasons, appellant submits that the conviction of the court below should be vacated and the indictment dismissed, or in the alternative, that the sentence of the appellant should be changed to run concurrently with the sentence being served in Maryland, or, in the alternative, that the appellant's guilty plea should be withdrawn and the appellant be allowed to plead anew.

Respectfully submitted,

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